Supreme Court, U.S.
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No. 98-2039

In the Supreme Court of the United States

OCTOBER TERM, 1998

BETTY ANN GUIDISH,
Petitioner

v.

JOSEPH D. LEHMAN, GREGORY R. WHITE, PETER A. BALESTREIRE, WILLIAM STICKMAN, R.G. HOLZER, RICHARD A. WATSON, SR., DAVID J. GOOD, DEPUTY FULCOMER, DEPUTY CALLITHEN, JAMES THOMPSON, SCOTT D. MONROE, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS, JOHN DOE, RICHARD ROE,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the suspension and termination of a public employee violates due process where that suspension and termination complied with every factor outlined by this Court in *Gilbert v. Homar*, 520 U.S. 924 (1997); *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1984); and *Mathews v. Eldridge*, 424 U.S. 319 (1976).

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STATEMENT OF THE CASE

Petitioner, Betty Ann Guidish, is an employee of the Pennsylvania Department of Corrections ("Department"), an agency of the Commonwealth of Pennsylvania. (Court App. 720).[1] Respondents are Gregory White, Superintendent at the Department's State Correctional Institution at Pittsburgh ("SCI-P"); Peter A. Balestreire, Personnel Officer at SCI-P; William Strickman, Captain at SCI-P; David J. Good, Deputy Superintendent for Treatment at SCI-P; and James Thompson, Inmate Program Manager at SCI-P.[2] (Pet. App. 2-3). Petitioner asserted a violation of due process in connection with a suspension and temporary termination of her employment.

This action arises from the escape from SCI-P of two inmates on May 4, 1994. The first inmate was recaptured on May 6, 1994 and the second on June 23, 1994. (Court App. 62). After they were recaptured, both inmates independently named petitioner as an accomplice to their escape. (*Id.*) On June 7, 1994, petitioner was suspended without pay pending further

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[1]The Court of Appeals Appendix will be referred to as (Court App. ____). The Petitioner's Appendix will be referred to as (Pet. App. _____).

[2]Petitioner also originally named as defendants, the Department; Joseph D. Lehman, Secretary of the Department; R. G. Holzer, Major at SCI-P; Richard A. Watson, Manager of the Correctional Institutes Department at SCI-P; SCI-P Deputy Superintendents Thomas Fulcomer and Harry Callithen; and Scott Monroe, a Pennsylvania State Trooper. Petitioner's due process claim was made only against the individual defendants and the district court dismissed all individual defendants except respondents. Petitioner did not appeal this decision. (Pet. App. 3).

investigation. On October 27, 1994, petitioner was arrested and arraigned on charges of facilitation of a prison escape, criminal solicitation to commit homicide, and criminal conspiracy. (Court App.729). On November 8, 1994, petitioner was notified by mail that a pre-disciplinary conference had been scheduled for Nóvember 15, 1994. That notification advised petitioner of the specific charges pending against her which stemmed from the fact that she had been formally charged with felonies related to her employment. (Court App. 1403-04).

Petitioner appeared at the pre-disciplinary conference with a union representative. At that conference, petitioner was again advised of the charges against her, presented with the Department's evidence against her, and given an opportunity to respond. (Court App.1038-42). On November 22, 1994, the Department by correspondence informed the petitioner that she was terminated due to the criminal charges filed against her which included aiding in the escape of the two inmates. (Court App. 1411-13).[3]

Petitioner had available to her a multi-step grievance process culminating in arbitration. (Court App. 1476-78). Pursuant to that grievance and arbitration process, petitioner was entitled to appeal both her suspension and termination when each occurred and receive a full evidentiary hearing. (Court App.

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[3]One paragraph of the termination letter, quoted only in part by petitioner, stated: "Due to the adverse publicity this incident has generated over the past several months, you have totally compromised your integrity to continue to be an effective and trusted employee. Once criminal charges have been filed, as has been the case, it renders an employee (sic) from effectively discharging their duties as required in a prison setting." (Court App.1412).

1470, 1483-84).[4] Petitioner chose not to exercise her right to such hearings or to arbitration. (Court App. 1251).

On April 12, 1995, petitioner's criminal trial began. On April 17, 1995, the prosecutor *nol. prossed.* all charges. On or about June 15, 1995, it was agreed that petitioner would be reinstated at SCI-P. Petitioner eventually received all lost benefits and back pay minus the amount of money she had received through unemployment compensation.

The district court, applying *Gilbert v. Homar,* 520 U.S. 924 (1997), held that the Department had a significant interest in removing petitioner from the workplace after she had been accused of assisting with the escape of two inmates without a prior hearing. (Pet. App. 18-19). The district court then applied the balancing test enunciated by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and held that the specific procedures that were made available to petitioner were adequate to meet the demands of due process. (Pet. App. 21-22).

The Court of Appeals held that since petitioner had available to her a multi-step grievance process culminating in arbitration, which she failed to exhaust, the district court correctly determined that she was not deprived of her right to due process. (Pet. App. 6).

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[4]Such hearings are available on a monthly basis. Both the union and management are each entitled to one unilateral monthly postponement. However, all subsequent monthly postponements requires the concurrence of both parties. (Court App. 1478-79, 1482-84).

REASONS FOR DENYING THE WRIT

Petitioner attempts to characterize this case as one in which the court's guidance is necessary to resolve a conflict among the circuits. A conflict concerning what the proper factors are to determine what process is due when a public employee is suspended and terminated. In fact, the court below, in unpublished opinions, correctly applied the proper factors as enunciated by this Court in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioner misconstrues the nature of these holdings and misstates the holdings of other circuits in an attempt to create the illusion of conflict and confusion. There is no conflict or confusion in the Circuits concerning the application of these factors. Though petitioner is unhappy with the results of the application of these factors to the specific facts of this case, petitioner's unhappiness is not a reason for the Court to grant certiorari.

A. Due Process Does Not Require That Suspension from Employment Always Be Proceeded by a Prior Hearing.

Petitioner in her petition for certiorari suggests that the fact that she was suspended with no prior notice or hearing is contrary to the due process principles enunciated by this Court. (Petitioner's Brief, p.2). It is not.

In *Gilbert v. Homar*, 520 U.S. 924 (1997), a police officer was suspended without pay and without the benefit of a prior hearing. *Id.* at 932. This Court ruled that the government in that case had an interest in immediately suspending employees

who occupy positions of public trust and who are accused of committing felonies; that such circumstances justify postponing the opportunity to be heard until after the initial actions are taken. *Id.* at 932-933. In reaching this decision, this Court specifically repudiated the view suggested *in dicta* by *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), that pre-deprivation process is always required in the employment context. This Court reaffirmed its position that due process is a flexible concept which requires different procedural safeguards depending on the particular situation involved. *Homar*, 520 U.S. at 930-31.

The district court, applying *Gilbert v. Homar*, held that the Department had a significant interest in removing petitioner from the workplace after she had been accused of assisting with the escape of two inmates without a prior hearing. (Pet. App. 18-19). This holding is not contrary to the principles enunciated by this Court but follows from a direct application of those principles.

B. Petitioner's Pre-Termination Hearing Complied with the Principles of Due Process Enunciated by this Court.

Petitioner asserts that the pre-termination hearing that was provided to her did not comply with the due process principles enunciated by this Court in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985). (Petitioner's Brief, p.19). This assertion is both factually and legally incorrect.

In *Loudermill*, this Court held that the essential requirement of due process is that notice and an opportunity to respond be given. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546 (1985).[5] Specifically, this Court stated that a "public employee is entitled to oral or written notice of the charges against him, an explanation of the *'employer's' evidence* and an opportunity to present his side of the story." *Id.* at 546 (emphasis added).[6]

Petitioner was apprised of the specific charges against her by written notice a week before the pre-termination hearing. *Loudermill* requires "oral or written notice of the 'charges,'" (emphasis added) and that is what petitioner received. *Loudermill* requires that an employee receive an explanation of the *employer's* evidence against her. Petitioner received that explanation when a report outlining the criminal charges pending against her and the allegations made by the two inmates was read at the pre-termination hearing. (Court App. 1038-42, 1405-1410).

Fundamentally, petitioner asserts that at the pre-termination hearing she was entitled to receive a full evidentiary hearing with the right to review every but of evidence obtained throughout the investigation and the right to face and cross

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[5]In *Loudermill*, this Court also made clear that the formality and procedural requirements of a pre-termination hearing can vary depending upon the nature of the subsequent proceedings available to the employee. *Loudermill, supra* at 545.

[6]Petitioner does not dispute that she had an opportunity to present her side of the story at the pretermination hearing. (Petitioner's Brief, p.9).

examine witnesses. (Petitioner's Brief, p.11). This assertion is directly contrary to the specific holding in *Loudermill*:

> In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. . . . [T]he pre-termination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions — essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id. at 545-546. *See also Arnett v. Kennedy*, 416 U.S. 134, 200 (1974) (cited with approval in *Loudermill*). (The pre-termination hearing is not a full evidentiary hearing held for the purpose of making an ultimate determination of the facts. That is provided through the appeal process. The function of the pre-termination hearing is to make a probable cause determination.)

Petitioner misconstrues the nature of the pre-termination proceedings outlined in *Loudermill*. The courts below applied the principle enunciated in *Loudermill* to determine that petitioner received those proceedings in this action.

C. The Existence of Post-Deprivation Grievance Procedures Is a Factor to Be Considered in Evaluating a Due Process Claim.

This Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) held that to determine what process is due, three distinct factors are balanced: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of any additional or substitute safeguards; and 3) the government's interest. *Id.* at 335.

In this action, the Court of Appeals applied the principles enunciated by this Court using one of its own cases, *Dykes v. SEPTA*, 68 F.3d 1564 (1995), *cert. denied*, 517 U.S. 1142 (1996). *Dykes* involved a public employee who had available to him a multi-step grievance process which culminated in arbitration who chose not to use it. *Id.* at 1571. The Court of Appeals in *Dykes* used the balancing test established in *Mathews v. Eldridge*, and held that in that case the risk of an erroneous determination in the grievance/arbitration procedure was not large; the value of additional or substitute procedures was not great, therefore the grievance/arbitration procedure in place were adequate to the meet the demands of due process. *Id.* at 1572.

Petitioner argues that the Court of Appeals' application of *Dykes*, which itself applied the factors identified by this Court in *Mathews v. Eldridge, supra*, is somehow flawed for not having specifically cited to that case. Petitioner cites no authority for the novel proposition that a court of appeals must cite to Supreme Court case law to properly apply the principles

enunciated by this Court. *Dykes* relied upon those principles and they were properly applied in this action.

Petitioner next argues that *Dykes* conclusion, that where there are grievance and arbitration procedures the risk of erroneous determinations[7] is not large and the value of additional substitute proceedings is not great, is somehow called into question by this Court's decision in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984). *McDonald* concerned whether the federal full faith and credit statute required that preclusive effect be given to an arbitration award. *Id.* at 288. That case had nothing to do with whether such arbitration procedures satisfy due process requirements.

Petitioner attacks the reasoning of the courts below by misstating it. Suggesting that they held that the mere existence of grievance procedures was fatal to petitioner's due process claim. The district court went through a factually specific analysis of precisely what grievance and arbitration process was available to petitioner in this action. (Pet. App. 20).[8] The district

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[7]The determination which the courts speak of concerns the suspension or termination of employment. Petitioner had available to her post-suspension and termination, the opportunity for full evidentiary hearings, and arbitration procedures to challenge those determinations. The individuals designated under the collective bargaining agreement to judge those hearings and arbitrate any dispute had the authority to reverse any erroneous determinations. Petitioner chose not to avail herself of those procedures.

[8]The Court of Appeals, after reviewing the district court's analysis, did not in its opinion repeat that factual detail. It nevertheless noted that petitioner had available to her a multi-step grievance process that culminated in arbitration. (Pet. App., p.6).

court, citing to *Dykes*, then applied the balancing test enunciated by this Court in *Mathews v. Eldridge*. (Pet. App. 21-22). It was on the basis of this detailed analysis that the trial court concluded that the specific procedures that were made available to petitioner were adequate to meet the demands of due process. *Id.*

Petitioner endeavors to distinguish *Dykes* by pointing to factual differences between that case and this action. Those factual differences do not change *Dykes* legal analysis and conclusion concerning due process. That conclusion simply stated was that the fact that an employee could obtain reinstatement with back pay pursuant to a grievance and arbitration procedure is a legitimate factor to be considered under *Mathews v. Eldridge* and under certain circumstances may preclude a due process claim. *Dykes, supra* at 1571-1572.

Finally, petitioner argues that the Third Circuit Court of Appeals' decision in *Dykes* conflicts with other circuits. It does not. The cases cited by petitioner, supposedly in conflict with *Dykes*, simply reiterate the proper pre-termination procedures under *Loudermill*. *Adam v. Sewell*, 946 F.2d 757, 764-65 (11th Cir. 1991); *Chaney v. Suburban Bus and Regional Transportation Authority*, 52 F.3d 623, 630 (7th Cir. 1995) (where it could not be determined whether pre-termination proceedings had taken place, the case was remanded to the district court for consideration of that issue); *Winegar v. Des Moines Independent Community School Dist.*, 20 F.3d 895, 901 (8th Cir. 1994) (appropriate pre-termination procedures were followed where employee was informed of charges against him and given the opportunity to present his side of the story, but post-termination procedures were not followed where the employee was never given the opportunity to have a full evidentiary hearing); and *Contour v. Univ. of Maine Systems*, 35 F.3d 6, 12 (1st Cir. 1994) (pre-termination, "the employee is

entitled to notice, an explanation of the employer's evidence, and opportunity to present his side of the story"; the absence of these procedures constitutes a violation of due process).

None of these cases in any way contradict or conflict with the Third Circuit Court of Appeals' holding in *Dykes*. In fact, in *Chaney*, the court stated "we have held, and other circuits have agreed 'that grievance procedures created by collective bargaining agreements can satisfy the requirements of due process.'" (*Citing,* among other cases, *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992); and *Jackson v. Temple Univ.*, 721 F.2d 931, 933 (3d Cir. 1993); two cases relied upon in *Dykes*). *Chaney, supra* at 628.

Petitioner does not cite to a single case which holds that the existence of post-deprivation grievance procedures is not a legitimate factor to be considered under *Mathews v. Eldridge* and traditional principles of due process. Those circuits that have considered the issue are in accord with *Dykes*. *Graning v. Sherburne County,* 172 F.3d 611 (8th Cir. 1999); *Chaney, supra* at 628; *Cushing v. City of Chicago*, 3 F.3d 1156 (7th Cir. 1993); *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992); *Naramanchi v. Bd. of Trustees of Connecticut State Univ.*, 850 F.2d 70 (2d Cir. 1988); *Lewis v. Hillsborough Transit Authority*, 726 F.2d 664 (11th Cir. 1983) (*per curiam, cert. denied*, 469 U.S. 822 (1984)); *Ash v. Bd. of Education of Woodhaven School Dist.*, 699 F.2d 822 (6th Cir. 1983).

In the present action, the courts below applied *Cleveland Bd. of Education v. Loudermill* and *Mathews v. Eldridge* and determined that the requirements of due process had been met under the specific facts of this case. Petitioner is clearly unhappy with the result of the application of these factually specific factors to this action; however, the courts below in applying

these factors followed the principles enunciated by this Court which are not in conflict or confusion.

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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